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Joan Williams

> Common sense is not what the mind cleared of cant spontaneously apprehends; it is what the mind filled with presuppositions . . . concludes.[1]

Any essay on theory must begin by remembering that legal education is plagued not only by too little theory but by too little focus on practice. I remember my distress as a student when I completed a full-year property course without ever having seen a lease or a mortgage. My friends and family (and, ultimately, clients) started giving me documents to review, and I knew nothing. The project of increasing the theoretical sophistication of first-year courses should be matched with an increased emphasis on concrete legal skills.[2] A class dedicated to teaching students basic lease forms, for example, imparts both practical know-how and first-hand knowledge of the way the relative power of landlords and tenants translates into legal vulnerability for individual leaseholders in a complex array of specific situations.[3]

Few would argue with the proposition that legal education needs increased focus on practice. Probably fewer would agree that theory is necessary for the practicing lawyer. I will argue less that theory is necessary than that it is inevitable—although, of course, it depends on what you mean by theory. The traditional approach draws upon an established canon of philosophers, notably Locke, Bentham, and Hegel, to delineate a unified, correct theory.[4] This

Joan Williams is Professor at the Washington College of Law, American University. This argument is an abridged version of Joan Williams, The Rhetoric of Property (unpublished draft), with footnotes kept to a minimum at the *Journal's* request. My thanks to Nell Newton and Joe Singer for their comments on a prior draft and to Jamie Boyle for help in organizing my thoughts.

1. Clifford Geertz, Local Knowledge 84 (New York, 1983).
2. See American Bar Association, Section on Legal Education and Admissions to the Bar, Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992) (the MacCrate Report).
3. See, e.g., Curtis J. Berger & Joan Williams, Property: Land Ownership and Use, 4th ed., ch. 3 (Boston, forthcoming 1997).
4. See, e.g., Stephen R. Munzer, A Theory of Property (New York, 1990); Margaret Jane Radin, Reinterpreting Property (Chicago, 1993). Another approach examines whether property rights can be justified, without regard to current political realities, to assess whether "we may live *comfortably* in [our] society." Jeremy Waldron, Property, Justification and Need, 6 Can. J.L. & Jurisprudence 185, 187 (1993); see Jeremy Waldron, The Right to Private Property (New York, 1988). This is an important inquiry, but its relevance to law students and practicing lawyers is not transparent.

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methodology reflects the premise that courts will turn to such theories to guide the exercise of their discretion, a premise that leaves students understandably skeptical.

Implicit in that model is the notion that people will agree if the theorist overcomes all rational objections. I begin from a different premise about the social processes of disagreement and persuasion, namely that disagreements stem not from lapses in rationality but from differences in social vision. Group A believes that the economy will raise all boats if allowed to do its work unchecked, and that any interference will so thoroughly gum up the works that the whole society will end up in worse shape. Group B believes it is immoral or unwise to allow great poverty in the midst of wealth; it doesn't think that helping or empowering the poor will dramatically corrode incentives to work, invest, and produce. Note that the key differences stem from divergent assumptions rather than from flaws in logic.

A pragmatist approach to property defines theory as the process of exposing the assumptions behind different social visions. It can help people inquire deeply about their values and acknowledge their complex and conflicting beliefs about property to create a mutually respectful democratic conversation. Persuasion is a key element of this approach, for persuasion is the key to democratic transformation.[5] It also is a key to good lawyering.

This approach to theory is more convincing to law students than one that relies on canonical authors. It is useful outside the classroom as well as within it. As professors and as public intellectuals, our role is to hold up a mirror, to help our students and our fellow citizens understand the complexity of their beliefs about property. We live in an era where income disparities are greater than at any time since 1939[6] and redistribution—whether through taxation, regulation, or social programs—is embattled. If one's goal is to change the current climate, the best hope is to convince Americans it is inconsistent with *beliefs they already hold.* On the other hand, if one's goal is to preserve things as they are—on the grounds that we live in a country that enjoys both great freedom and great prosperity—one must defend the current climate against challenges. Thus a pragmatist approach to theory is useful regardless of our political beliefs and whether we are inside or outside the classroom.

I will examine the last ten years of property theory from this perspective. I first discuss the image of property that presents itself as common sense. I then discuss the attempts to dislodge it, in whole or in part, considering the work of Carol M. Rose, Jennifer Nedelsky, Laura S. Underkuffler, Margaret Jane Radin, and Joseph William Singer. I conclude by briefly sketching my own approach, and the work of the historians and theorists upon whose work I draw.

5. Other property theorists also have focused on persuasion. See generally Joseph William Singer, Legal Storytelling: Persuasion, 87 Mich. L. Rev. 2442 (1989); Carol M. Rose, Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership 25–45, 293–97 (Boulder, 1994).

6. See Paul Starobin, Unequal Shares, Nat'l J., Sept. 11, 1993, at 2176.

An Assault on Common Sense

The intuitive image of property was simultaneously enshrined and belittled in Thomas C. Grey's influential 1980 formulation:

> Most people, including most specialists in their unprofessional moments, conceive of property as *things* that are *owned by persons*. To own property is to have exclusive control of something—to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it. Legal restraints on the free use of one's property are conceived as departures from an ideal conception of full ownership.[7]

But as Mary Ann Glendon aptly notes, a "property-rights enthusiast . . . probably does not even have the right to burn dead leaves in his own back yard."[8]

"Common sense" about property, upon reflection, is a pastiche of three distinct traditions.[9] The first is the absolutist rhetoric that extols property rights as sacred and inviolable because they protect the people against the overweening power of government.[10] In everyday discourse, this rhetoric typically melds with arguments from two other sources. One is the strain of utilitarianism that asserts that property rights are efficient,[11] or at least that destabilizing property rights would decrease the incentives to invest and so would impoverish everyone in the end.[12] This strain is combined with a reading of Locke that stresses not his proviso or his labor theory of value, but his message about moral desert.[13]

These three themes are rolled together in the vision of economic liberalism, linked with (one reading of) Locke's narrative of men gathering acorns in the wild. Locke first establishes the moral desert of current ownership by intimating (without ever being so crass as to say so) that the key point for determining property rights is some time in the distant (indeed, mythic) past when property was earned by the sweat of the gatherer's or (as in *Pierson v.*

7. The Disintegration of Property, *in* Nomos XXII, eds. J. Roland Pennock & John W. Chapman, 69, 69 (1980).

8. Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse 9 (New York, 1991).

9. I should note that some scholars distinguish sharply between these traditions. See generally Robert C. Ellickson, Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights, 64 Wash. U. L. Q. 723 (1986); Rose, *supra* note 5. My claim is that utilitarian and libertarian themes have long been linked in a strain of liberalism often called possessive individualism. See Berger & Williams, *supra* note 3, § 1.4.

10. See David Schultz, Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding, 37 Am. J. Legal Hist. 464 (1993).

11. See, e.g., Harold Demsetz, Toward a Theory of Property Rights, Am. Econ. Rev. Papers & Proc., May 1967, at 347, 347–56; Richard A. Posner, Economic Analysis of Law, *in* Robert C. Ellickson et al., Perspectives on Property Law 45, 46–48 (Boston, 1995) [hereinafter Perspectives].

12. See Rose, *supra* note 5, at 3, 28–30.

13. See, e.g., Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (Cambridge, Mass., 1985).

Post[14]) the hunter's brow. Locke further intimates that property rights are inevitably of the on-off (you eat it or I eat it) variety, a theme that tracks absolutist rhetoric. Lastly, Locke's narrative embeds utilitarianism, with the argument that private property is efficient because common ownership would eliminate the incentive to gather more acorns, and so everyone would be hungrier.[15]

As the citations show, much (though not all[16]) of law and economics tracks this "commonsense" combination of absolutist rhetoric, utilitarianism, and libertarianism. Law and economics has played a central role in property theory in the past ten years: the best single source for such work is the collection of essays entitled *Perspectives on Property Law* edited by three prominent law and economics scholars.[17] Because that collection does an outstanding job of exploring contemporary property theory in the law and economics mode, and because the tenets of law and economics are well known, I refer readers to it for a sense of the depth and sweep of that literature. I will use this limited space to focus on work that does not follow an established school, discussing theorists who reject all or part of economic liberalism. First I discuss attempts to dislodge absolutist rhetoric. Then I discuss the alternative visions presented by property theorists. In both contexts I also sketch a pragmatist approach.

Still Disintegrating After All These Years

When Thomas Grey announced the disintegration of property in 1980, he spoke too soon. Absolutist rhetoric is alive and well, and property theorists have spent considerable effort trying to dislodge it. Carol Rose has led the way in her brilliant analysis of the role of narrative in property talk (which influenced my description of Locke's native narrative). Joseph Singer has carefully excavated legal realist critiques of "conceptualism" and has linked them with a novel reading of the case law. In his articles and his innovative casebook,[18] Singer points out that common law doctrines such as adverse possession, the public trust doctrine, and water law, as well as antidiscrimination statutes and *State v Shack*,[19] run counter to absolutist rhetoric. Singer proposes shifting away from the imagery of "an isolated individual whose presumptive control of the resource is absolute"[20] to an analysis of the legiti-

14. 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805).

15. See, e.g., Demsetz, *supra* note 11. This description reflects the influence of Carol Rose. See Rose, *supra* note 5, at 28–30.

16. See, e.g., Bruce A. Ackerman, Regulating Slum Housing Markets on Behalf of the Poor, *in* Perspectives, *supra* note 11, at 398.

17. Perspectives, *supra* note 11. Note that this is a new edition of Economic Foundations of Property Law, ed. Bruce A. Ackerman (Boston, 1975). For another excellent collection of essays from a very different perspective, see Elizabeth Mensch & Alan Freeman, Property Law (New York, 1992).

18. See Property Law: Rules, Policies, and Practices 166 (Boston, 1993); The Reliance Interest in Property, 40 Stan. L. Rev. 611, 663–701 (1988) [hereinafter Singer, Reliance Interest].

19. 277 A.2d 369 (N.J. 1971).

20. See Singer, Reliance Interest, *supra* note 18, at 657.

mate expectations that arise from the relationship of the parties. "Rather than ask who owns the property, we should ask who has a right to say something about [its] use or disposition . . . ."[21] Speaking of plant closings, he argues that we should "decide who wins the dispute on grounds of policy and morality, and then . . . *call* that person the owner."[22]

Singer further illuminates his approach in an article coauthored with Jack M. Beermann.[23] Discussing *Lucas v. South Carolina Coastal Council,*[24] in which the U.S. Supreme Court struck down a land use program designed to protect coastlands, Singer and Beermann criticize the Court for ignoring the social policies the legislation sought to effect. They discuss the importance of coastal areas in fish and wildlife conservation and in providing hurricane protection. They conclude that "it is imperative that we shift the discussion from identifying core property rights to begin talking about what is good for human beings,"[25] and they propose three ideals that inform their vision of property: to structure social relationships to encourage interdependence and mutual reliance; to effectuate a fair distribution of social obligations; and to disperse resources and power. In another article, Singer elaborates the first ideal, arguing that property rights should be "redistributed from owners to nonowners . . . to protect the interests of the more vulnerable persons in reasonably relying on the continuation of the relationship."[26]

Jennifer Nedelsky launches a similar attack on absolutist imagery, which she believes has dominated our constitutional tradition and distorted our political life. She argues for a shift from absolutism to a view of property rights as the "ever-shifting product of collective decisionmaking."[27] Another constitutional theorist, Laura S. Underkuffler, has vehemently disagreed with the view that property should disintegrate into shifting sets of social relations. To go that far, Underkuffler points out, leaves vulnerable the property of the poor as well as the rich. She sharply distinguishes between *property rights,* which she thinks should retain an aura of stability, and the *current distribution of property rights,* which she thinks should change.[28]

It is hard to see how we can redistribute property without violating the stability of property rights: after all, we have to redistribute the property of *someone in particular.* Yet Underkuffler's vehemence warns us of the dangers of

21. See *id.* at 641.

22. See *id.* at 638 (footnote omitted).

23. See The Social Origins of Property, 6 Can. J.L. & Jurisprudence 217 (1993).

24. 505 U.S. 1003 (1992).

25. See Singer & Beermann, *supra* note 23, at 241.

26. See Singer, Reliance Interest, *supra* note 18, at 699.

27. Private Property and the Limits of American Constitutionalism: The Madison Framework and Its Legacy 274 (Chicago, 1990).

28. The Perfidy of Property, 70 Tex. L. Rev. 293, 315 (1991) (reviewing Nedelsky, *supra* note 27) ("It is impossible to see how [Nedelsky's] conception of rights, reconceived, does not just leave it all up for grabs."). Underkuffler spells out her approach in Underkuffler-Freund, Takings and the Nature of Property, 9 Can. J.L. & Jurisprudence 161 (1996), which highlights the distinction between the absolutist *idea* of property and the actual *institution* of property.

challenging absolutist rhetoric by insisting on fluidity (in either realist or postmodern language). If even an astute commentator like Underkuffler is thrown off balance, this approach would seem to have limited persuasive potential for a larger (and probably less receptive) audience.

What is a theorist to do? Note that the imagery of disintegration assumes that the only alternative to absolutism is a universe of infinite fluidity. Not only is this image scary to many people, it is unconvincing. As Underkuffler notes, though we as a society do not act on our absolutist rhetoric, we do place a high premium on the stability of property rights. Surely the theorists of disintegration do not want a society where the government can take the private property of unpopular groups without constraint. The key point is not that *no* limits exist on property rights but that the nature of the limits that exist is imperfectly captured by absolutist rhetoric. The challenge is to make explicit these more elusive limits.

A useful start is to note that Anglo-American property law has always countenanced redistributions. The most dramatic example is adverse possession, through which courts have taken property from A and given it to B since the thirteenth century. Eminent domain stands for the same proposition, for it allows the government to destroy the home and neighborhood that anchor your identity in return for a paltry pile of lucre.[29] American courts' enthusiasm for enforcing covenants against successors—even covenants it makes up out of whole cloth (implied reciprocal servitudes)—again entails redistribution of the bundle of sticks. Implied easements involve redistribution from the owner of the servient tenement to the owner of the dominant tenement. This reading of the common law makes redistribution seems quotidian, providing important reassurance that chaos is not the only alternative to absolutism.[30]

The larger project is to examine our form of life to surface intuitions that form limits on property rights far more subtle than the absolutism/fluidity dichotomy suggests. I will briefly discuss some of these counterthemes, beginning with the work of Carol Rose.

That Mean Old Market Embeds Community

Carol Rose is the most stylish property theorist, the only one I would consider reading in bed. Her writing contains a witty mixture of high and low, dramatic shifts in pacing, Faulknerian narrative techniques, and an authentic sense of history.[31]

She also has a deep commitment to utilitarianism, in particular to the notion of property as a wealth-producing institution.[32] Stable property rights are good to the extent they encourage trade and inspire people to invest their efforts in things they claim.

29. See, e.g., Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

30. See generally Berger & Williams, *supra* note 3.

31. See William W. Fisher III, Stories About Property, 94 Mich. L. Rev. 1776 (1996) (reviewing Rose, *supra* note 5). "That mean old market" is Rose's phrase.

32. See Rose, *supra* note 5, at 3–4.

> All this activity and trade, of course, make us collectively wealthier. So if we want to reach that result of collective well-being (and who would not, other things being equal?), we need to have clear and secure property rights; the more valuable the resources at stake, the clearer and more secure the property rights should be.[33]

All this sounds standard. But while Rose accepts utilitarian principles, she rejects the absolutist rhetoric and libertarian themes that so often accompany them. She also rejects the tenet that on-off property rights inevitably produce the most efficient allocation of resources; instead she argues that common ownership and shared water rights are sometimes more efficient.[34] Finally, she seeks to balance her focus on property as a wealth-creating institution with attention to the links between property and community. Sometimes she sounds republican themes (discussed below). Most recently, she crystallizes her longstanding fascination with Albert O. Hirschman's work on the theme of *doux commerce* into the argument that "property regimes . . . induce the very qualities of cooperation, attentiveness to others, responsibility, and self-restraint that themselves are the prerequisites to the successful handling and trade of property."[35] Property, she continues, is an "educative institution," not "the fierce bulldog guardian of autonomous individual rights, but rather . . . the gentle and somewhat fragile persuader, rewarding the character traits needed not only for commerce but also for self-government."[36]

Property and Personhood

Undoubtedly the most influential theorist outside law and economics is Margaret Jane Radin.[37] In a series of articles that began in 1982, Radin has explored the notion that property bound up with an individual's personhood—an heirloom, a home, a wedding ring—should receive greater protection than fungible property. Radin's goal is to explain our "intuitions."[38] In her initial article, these were often intuitions that people have a special relationship to their homes. For example, she argued that a tenant's personhood interest should trump the landlord's fungible interest, so that the implied warranty of habitability and other tenant protections are justified even though they redistribute rights and duties between landlords and tenants.[39]

Although Radin's initial goals were redistributive, courts have not generally cited her theory to limit traditional property rights. Radin herself has moved

33. *Id.* at 3.

34. *Id.* at 103–96.

35. See Propter Honoris Respectum: Property as the Keystone Right? 71 Notre Dame L. Rev. 329, 364 (1996); see Hirschman, The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph (Princeton, 1977).

36. Rose, *supra* note 35, at 364.

37. See generally Radin, *supra* note 4.

38. See Property and Personhood, 34 Stan. L. Rev. 957, 996 (1982). My goal as well is to explain our intuitions, but I argue they can be more accurately explained by reference to the social history of ideas in the U.S. than by reference to Kant or Hegel.

39. *Id.* at 992–96.

to a focus on whether personhood is sullied when people commodify part or all of themselves or others, notably their reproductive capacity as "surrogate" mothers, their sexuality as prostitutes, their children in baby-selling proposals.[40] Commodification does not involve limits to traditional property rights; instead it involves the application of property logic to arenas not traditionally formulated in market terms. Courts have used Radin's theory to prevent extension of the property system to arenas not traditionally commodified, notably in surrogacy cases.[41]

Though Radin's theory has proved effective for policing the traditional boundaries of the property system, it has proved ineffective in projecting a resonant and persuasive vision that justifies limiting traditional property rights in the name of her proposed value, human flourishing. One disadvantage is her traditionalist methodology. She links her property-and-personhood theory with Hegel. While Locke's thought is arguably embedded in the Constitution, courts (and students) might well ask why they should care about Hegel—or about Kant, to whom Radin recently has shifted her allegiance.[42] A second disadvantage is the vagueness of Radin's proposal to design property around human flourishing: what precisely is human flourishing? Even if it could be adequately defined, American courts are not used to viewing their charge as including a mandate to effect human flourishing, nor do the American people seem much committed to it as an entitlement for all (consider the recent "welfare" bill).

All this is important because of the role property-and-personhood often plays in contemporary legal literature. In at least one context it was the only theoretical perspective represented other than Lockean moral desert theory and utilitarianism.[43] This formulation of property theory ultimately leaves economic liberalism enshrined as common sense, challenged only by an openly normative and "theoretical" alternative that courts virtually never cite to limit traditional property rights.

The Philosophy of Femininity

When the remaining theorists are considered together, a striking thread runs through them: Singer, Underkuffler, and Nedelsky all rest the alternatives they advocate, in whole or in part, on the strain of feminist theory I call the philosophy of femininity. This strain launches a critique of economic liberalism, in particular its focus on autonomy and the pursuit of self-interest, in the name of values stereotypically associated with women, notably their focus on relationships and an ethic of care.[44]

40. See, e.g., Market-Inalienability, 100 Harv. L. Rev. 1849 (1987).

41. See, e.g., Stiver v. Parker, 975 F.2d 261, 267 n.8 (6th Cir. 1992); Johnson v. Calvert, 851 P.2d 776, 792 (Cal. 1993) (Kennard, J., dissenting); *In re* Baby M, 537 A.2d 1227, 1249 (N.J. 1988).

42. See Radin, *supra* note 4, at 7.

43. See, e.g., Symposium: Time, Property Rights, and the Common Law, 64 Wash. U. L.Q. 661 (1986).

44. See generally Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797 (1989); Gender Wars: Selfless Women in the Republic of Choice, 66 N.Y.U. L. Rev. 1559 (1991).

Singer cites the work of Martha Minow, who links her sophisticated "social relations approach" to a broad sweep of twentieth-century scholarship but relies heavily on feminist scholars influenced by the philosophy of femininity.[45] Nedelsky argues in favor of reconceiving autonomy by recognizing the relationships of nurturance that make autonomy possible, citing (among many other sources) Minow and other philosophers of femininity.[46] Underkuffler describes the "comprehensive" approach to property she finds in the thought of the framers as recognizing "the individual's need to develop the capacities of self in the context of relatedness to others," citing Nedelsky, among others.[47]

I have argued that the ideology of domesticity, the gender ideology that associates women with caring and relationships, emerged at about the same time as the economic interpretation of liberalism and has long been its dangerous supplement.[48] Thus it is not surprising that theorists use domesticity to anchor critiques of economic liberalism. A look back to Carol Rose shows that she, too, frames her critique by re-gendering property, rejecting the male-resonant "fierce bulldog guardian of autonomous individual rights" in favor of a vision of property that associates it with femininity: the "gentle and somewhat fragile persuader."[49] Gender has long been a key language of politics in this country. Whether it is the best language to seduce Americans away from economic liberalism remains an open question.

A Pragmatist Approach

Typically the best way to persuade someone is to begin from what that person already believes. This frames a new approach to property theory that requires an excavation of intuitions, to show students or any group of citizens that they *already* have intuitions about property that do not conform to the intuitive image of absoluteness. The problem is that the economic vision has become so dominant that students, like Americans generally, have lost the sense that they can defend their noneconomic intuitions articulately.

Pragmatist property theory can help them do so. American history is replete with vernacular redistributive themes. In fact, the notion that property is inherently and only economic is a recent one.[50] A pragmatist approach turns away from the canon of philosophical greats, on the grounds that what

45. See Martha Minow, Making All the Difference 127, 195–203, 206–14 (Ithaca, 1990). Singer also uses "social relations" language to encompass the realists' revival of property as involving relationships of power. See, e.g., Singer, Reliance Interest, *supra* note 18, at 653.

46. See Nedelsky, *supra* note 27, at 272–75, 331 n.195; Reconceiving Autonomy: Sources, Thoughts, Possibilities, 1 Yale J.L. & Feminism 7 (1989); Property in Potential Life? A Relational Approach to Choosing Legal Categories, 6 Can. J.L. & Jurisprudence 343 (1993).

47. On Property: An Essay, 100 Yale L.J. 127, 147 (1990).

48. Domesticity as the Dangerous Supplement of Liberalism, J. Women's Hist., Winter 1991, at 69; Reconstructing Gender (unpublished draft).

49. Rose explicitly ties community to femininity through references to Carol Gilligan and Robin West in Rose, *supra* note 5, at 39–42; see also *id.* at 233–63.

50. See James T. Kloppenberg, The Virtues of Liberalism, 74 J. Am. Hist. 9 (1987).

matters is the social history of ideas.[51] We need to look at the rhetoric of property outside the law as well as within it to get clues about how to frame arguments that will resonate with a public confused about its own complex and inconsistent beliefs about what ownership should mean today.

I will set forth several such themes in closing. The first is the sense that property rights can sometimes present a threat to human dignity. This emerges strongly in discussions of commodification: to most people the idea of selling babies is an affront. Some, though fewer, feel the same way about the sale of organs from third-world donors to recipients in richer countries. The language of human dignity also emerges in *State v. Shack*,[52] the famous New Jersey Supreme Court case that uses the language of human dignity to hold that a farmer may not bar access to government workers offering medical and legal help to farmworkers: "Property rights serve human values. They are recognized to that end and are limited by it. . . . [T]he needs of the [farmworkers] may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity."[53] The dignity theme emerges as well in implied warranty of habitability cases, in arguments or fact statements that intimate that it is intolerable for a landlord to rent a dangerous apartment that reeks of excrement.[54]

The point is not that courts have a coherent sense of what limits on property should be imposed in the name of human dignity. But human dignity language reminds us that most people believe that *at some point* the demands of human dignity require that property rights be limited despite the intuitive image of property as absolute. Given that the concept of human dignity is not doctrine (as it is in public international law),[55] it presents several pitfalls as rhetoric of property. First, in everyday conversation arguments about human dignity often emerge in religious language. I once had a student argue against the sale of kidneys on the grounds that "you don't own your body." Asked who does, he simply pointed up. Locke originally justified his proviso limiting property rights on the ground that souls had equal dignity before the Lord;[56] *State v. Shack* cites the golden rule;[57] another (concurrent estates) case cites Matthew for the principle that the strong should protect the weak from the rigors of the market.[58] But given the taboo on religious lan-

51. My use of historical sources is different from that of many historians. While historians tend to focus on particularity and "the pastness of the past," my focus is on "keywords." See Daniel T. Rodgers, Contested Truths: Keywords in American Politics Since Independence (New York, 1987).

52. 277 A.2d 369 (N.J. 1971).

53. *Id.* at 372.

54. See Hilder v. St. Peter, 478 A.2d. 202, 207 (Vt. 1984).

55. See Universal Declaration of Human Rights, Dec. 10, 1948, U.N. G.A. Res. 217A (III), U.N. Doc. A/810; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

56. John Locke, The Second Treatise of Government ¶¶ 4, 6, 19, 27, 31–33, *in* Two Treatises of Government, 2d ed., ed. Peter Laslett (London, 1970).

57. 277 A.2d at 373.

58. See Harris v. Crowder, 322 S.E.2d 854, 860 (W. Va. 1984).

guage in legal contexts (and intellectual contexts generally),[59] arguments based on human dignity often sound vague and sentimental compared to an economistic vision that presents itself as common sense. What, after all, are "human values"?

The most effective use of the human dignity strain conveys its message through a statement of the facts. In *Hilder v. St. Peter,*[60] a Vermont implied warranty of habitability case, the appellate court gives a detailed description of a conscientious tenant in an apartment reeking of excrement—plaster collapsing on a crib, broken windows threatening toddlers' hands, no adequate locks or working plumbing. This approach evades the problems posed by the liberal dignity strain and highlights its redistributive potential.

The other strains of redistributive rhetoric reflect the influence of republicanism. The republican vision is important because it presents an alternative to the assumption that the key goals of the property system are economic. In the republican vision, the property system's key goal is political: to create citizens with enough independence to enable them to preserve the republic by dedicating themselves to pursuit of the common good. Legal historians and theorists have documented a variety of republican themes in American property law. Carol Rose and Jennifer Nedelsky have explored antifederalist themes of independence, virtue, and self-rule;[61] Rose's ground-breaking work also finds republican themes in takings law.[62] William H. Simon explores an egalitarian "social-republican" vision focused on small-scale, owner-managed enterprises in which owners are subject to alienation and accumulation restraints.[63] Gregory S. Alexander, William W. Fisher III, and William Novak have written insightful legal histories.[64] Frank I. Michelman has employed republican imagery in arguing for a constitutional notion of property concerned with the distribution of property rights as well as their possession.[65]

From a pragmatist perspective, the challenge is to identify resonant strains of republican rhetoric that have potential to contest economic liberalism. There are at least three. One is the notion that property rights should be designed to achieve the common good and should be limited to the extent

59. See Henry F. May, Religion and American Intellectual History, 1945–1985: Reflections on an Uneasy Relationship, *in* Religion and Twentieth-Century American Intellectual Life, ed. Michael J. Lacey, 12 (New York, 1991).

60. 478 A.2d. 202 (Vt. 1984).

61. Rose, *supra* note 5, at 58–66, 82–93; Nedelsky, Democracy, Justice, and the Multiplicity of Voices: Alternatives to the Federalist Vision, 85 Nw. U. L. Rev. 232 (1990).

62. See *Mahon* Reconstructed: Why the Takings Issue Is Still a Muddle, 57 S. Cal. L. Rev. 561 (1984); Rose *supra* note 5, at 49–70.

63. See Social-Republican Property, 38 UCLA L. Rev. 1335 (1991).

64. Novak, The People's Welfare (Chapel Hill, 1996); Alexander, Time and Property in the American Republican Legal Culture, 66 N.Y.U. L. Rev. 273 (1991); Alexander, Commodity and Propriety: Dialectics of Property in American Legal Thought, 1776–1970 (Chicago, forthcoming 1997); Fisher, The Law of the Land: An Intellectual History of American Property Doctrine (unpublished Ph.D. dissertation, Harvard University, 1991).

65. Possession vs. Distribution in the Constitutional Ideal of Property, 72 Iowa L. Rev. 1319 (1987).

ney fail to do so.[66] This theme provides new imagery in which to contest the claim that regulation "takes" an owner's property rights: perhaps the landowner never owned the right to trash the beach.[67] We tend to articulate this intuition in the Progressive language of "regulation in the public interest," but such language is part of a much longer tradition of implied limitations on property if such limitations are necessary to achieve the common (or "public") good or to create a well-regulated society.

The challenge for contemporary theorists is that the notion of a unitary "public interest" is no longer convincing. Historians' work provides a counterstory to the conventional one that property rights used to be absolute but now are outrageously corroded; the next step is to revitalize a language of the common good, probably by reopening the question of who owns what. For example, in takings cases, why should landowners be allowed to silently pocket windfalls created by public investment (as when land prices skyrocket next to a subway stop or highway interchange), while they insist on protection from wipeouts (as when development is forbidden on the beach)? We as a society *can* privatize the upside risk that property prices might rise, while socializing the downside risk that they might fall, but is this what we want to do? This approach certainly imposes considerable costs on taxpayers.[68]

Two additional themes reflect the potential (and the limitations) of republican rhetoric for articulating egalitarian visions of property. The core republican egalitarian notion is that property is so important that everyone should have some of it. This theme, ably voiced by Charles A. Reich in "The New Property,"[69] framed freedmen's demands for "forty acres and a mule" after the Civil War, as well as the Homestead Act of 1862, and the thought of Thomas Skidmore and other nineteenth-century social critics.[70]

An important variant emerged when republican egalitarian rhetoric combined with themes from domesticity to create the republican/domestic notion that widespread home ownership is important because it creates stable families that produce good citizens. This notion is implicit in homestead exemptions as well as in some of the largest governmental programs ever invented (the FHA and VA mortgage programs).[71] America's love affair with the single-family "home" in the "nice" neighborhood also is the basis of some

66. This theme emerges strongly in both takings and eminent domain law, see Berger & Williams, *supra* note 3, § 6.1 (eminent domain), ch. 8 (takings).

67. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

68. Cf. Windfalls for Wipeouts: Land Value Capture and Compensation, eds. Donald Hagman & Dean Misczynski (Chicago, 1978); Joan Williams, Socializing the Downside, Privatizing the Upside Risk: A Fresh Look at Takings (unpublished draft).

69. 73 Yale L.J. 733 (1964).

70. This literature is reviewed in Berger & Williams, *supra* note 3, § 1.3. Skidmore, like Reich, combined republican rhetoric with the human dignity strain. Reich used a liberal dialect; Skidmore used a religious one.

71. See *id.*; see also Paul Goodman, The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840–1880, 80 J. Am. Hist. 470 (1993).

of the most exclusionary devices ever invented, including American courts' expansive approach to the enforceability of (often racial) covenants and localities' extensive use of exclusionary zoning.[72] In short, republicanism has produced both some of the most sweeping redistributive rhetoric in the American tradition and the legal infrastructure of American apartheid.[73]

72. See Berger & Williams, *supra* note 3, chs. 7, 9.

73. Space constraints prevent me from discussing the development of the fascinating new field of racial geography. See Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass (Cambridge, Mass., 1993); Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 Harv. L. Rev. 1843 (1994). Nor have I been able to discuss the important scholarship that explores the use of property rhetoric in arenas outside the traditional realm of property doctrine, see, e.g., Cheryl I. Harris, Whiteness as Property, *in* Critical Race Theory, eds. Kimberle Crenshaw et al., 276 (New York, 1995).